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No. 6997

IN THE  
United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT.

FALLON E. KIRK,

*Claimant and Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Libelant and Appellee,*

AMERICAN GAS SCREW V-293—Her  
Motors, Tackle, Apparel, Furniture, Etc., and  
ERIC HOGSTROM,

*Respondent.*

**BRIEF FOR APPELLANT**

H. WM. HESS,  
STANLEY M. DOYLE,  
Civic Center Building,  
Los Angeles, California,  
*Proctors for Appellant.*

**FILED**

**JAN 11 1933**

**PAUL P. O'BRIEN,**

**CLERK**



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**BRIEF FOR APPELLANT**

**Preliminary Statement**

The Motor Vessel V-293 concerned herein is an undocumented American vessel of less than five net tons which was seized on the third day of March, 1932, while standing out to sea in Los Angeles outer harbor, by the United States Coast Guard. At the time of seizure, the Motor Vessel had a quantity of foodstuffs but no contraband of any nature. The United States thereafter filed a Libel of Information in the United States District Court, in

the Southern District of California, Central Division, for the alleged violation of Section 4377 *Revised Statutes*, (46 U. S. C. A. 325), being the Statute providing for penalties for violation of license. The charterer and owner separately filed their answer and prayed that the Libel be dismissed.

The case was tried in Los Angeles before the Honorable Harry A. Hollzer, District Judge. The answers of the charterer and owner were denied and the vessel was ordered forfeited under the allegations and prayer of the Government. Thereafter Appeal was prayed for by the owner only and was allowed.

### **Opinions Below**

The District Court rendered its findings of fact and conclusions of law which are found in the Transcript at pages 15-16-17 and entered its Final Decree of Condemnation, Forfeiture and Order of Disposition which will be found in the Transcript at pages 17-18-19.

### **Questions at Issue**

The first question presented is whether or not the Motor Vessel herein falls within the purview of Section 4377 of *Revised Statutes* of the United States. As it is contended that this Motor Vessel was never licensed, and is a distinct exception to the license required and designated in the provisions of Section 4377.

Second, the question as to the violation of any law by a Vessel of this type while engaged in transporting goods gratuitously that were not contraband.

Third, the admission of incompetent and prejudicial evidence, both as to testimony and exhibits.

The final question as to whether or not the Appellant herein did not suffer confiscation of his property without due and legal process of law.

### Statutes Involved

46 U. S. C. A. 325 (Section 4377 *Revised Statutes*)  
(Penalty for Violation of License):

“Whenever any licensed Vessel is transferred, in whole or in part, to any person who is not at the time of such transfer a citizen of and resident within the United States, or is employed in any other trade than that for which it is licensed, or is found with a forged or altered license, or one granted for any other Vessel, such Vessel with her motors, tackle, apparel and furniture, and the cargo found on board her, shall be forfeited. But Vessels which may be licensed for the Mackerel Fishery shall not incur such forfeiture by engaging in catching Cod or fish of any other description whatever.”

An Act to amend the laws for preventing collisions of Vessels and to regulate equipment of certain motor boats on navigable waters of the United States, approved June 9, 1910, and the regulation thereto appertaining from the office of the Secretary of the Department of Commerce, Bureau of Navigation Steam Boat Inspection Service, dated December 28, 1931, and known and designated as Department Circular No. 236 of the said Department of Commerce and quoting from paragraph No. 16 of the same:

16. “All motor boats of 5 net tons or over engaged in trade must be *documented*; that is to say, *licensed* by the collectors of customs. *Vessels under 5 net tons are not documented in any case.* The

license of the Vessel obtained from the collector of customs (designated a document) is additional to and must not be confounded with the license required for the operator of a motor boat.”

The Fifth Amendment to the Original Constitution of the United States of America:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in the cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

### Statement of Facts

The Motor Vessel V-293 which we shall hereafter refer to as the “Vessel” was built at Point Loma, California, at the instance, request and payment of the appellant herein.

The Vessel was commissioned for duty during October, 1931, and was at once chartered to one Eric Hogstrom of San Pedro, California, under Charter Agreement (Appellant’s Exhibit B), page 74 of Transcript, after application for number to the Bureau of Navigation of the Department of Commerce had been requested and granted for an *undocumented* Vessel of LESS than five net tons, for the PRINCIPAL occupation of FISHING, copy

of original application being Appellee's Exhibit No. 9, appearing at page 70 of the Transcript.

From the time of Commission until the seizure the Vessel engaged in diversified vocations among them being Marine Motion Picture photography, knowledge of which fact is evidenced by the Appellee's subpoena duces tecum served on one Buck McGowan of Wilmington, California, requiring said McGowan to bring into Court three checks numbered 162, 242, 257, which checks represented the payment for use of the Vessel herein at sundry times and occasions and which subpoena duces tecum will be found at pages 13-14 of the Transcript.

Appellee, in order to support its Libel of Information wisely chose not to introduce the three checks mentioned herein into evidence.

This Vessel was seized by the United States Coast Guard Patrol Boat No. 257, on March 3, 1932, shortly prior to 6 A.M. while outbound in Los Angeles Outer Harbor. An immediate and thorough search resulted and no contraband or illegal goods of any kind or description was found, and no navigation rule or regulation was being violated; however, a quantity of foodstuffs designed and fit for human consumption was aboard the Vessel. (Transcript of Record, p. 39.)

At the time of trial the Government offered as its first witness, Commander Muller S. Hay in charge of Section Base No. 17 at San Pedro, California.

Commander Hay testified as to his receipt of Government Exhibit No. 1, from F. L. Austin of the United States Coast Guard at San Francisco, California, over strenuous objections of the respondent herein.

A brief comparison of the Government's Exhibit No. 1 and Respondent's Exhibit (C) plainly indicates that no similarity exists between the two exhibits, particularly as concerns the quantity of foodstuffs involved. Which fact is admitted by the Government on direct testimony of Stanley M. Megos which appears in the first paragraph of page 27 of the Transcript of Record.

Appellant directs attention to the admission of biased, prejudicial, incompetent evidence that is a part of this record and was of such a nature as to estop the appellant from enjoying his day in Court in the manner prescribed by the law.

Some examples of the evidence are found in the Transcript of Record at pages 41, 44, 45, 46, 47, 48 and 49; the entire testimony of Lieutenant John H. Fletcher, beginning at page 50 of the Transcript of the Record and continuing to page 58.

The entire testimony of Thomas Noland, beginning at the bottom of page 64, Transcript of Record, and continuing to the bottom of page 69.

Proctors for Government confused the question of the License of the Vessel involved herein by neglecting to show that although a license for fishing had been issued to the Vessel that it was in compliance with the Statutes of the State of California and was a California fishing license, rather than a Federal license (Bottom of page 37, Transcript of Record).

That upon conclusion of the trial, the Trial Court (Tr., pp. 141-142) made certain conclusions and statements and thereafter filed its Findings of Fact and Conclusions of Law which appear in Transcript of Record at pages 15, 16, 17, that thereafter the Court entered

its Decree, which appears at pages 17, 18 and 19 of the Transcript of the Record, wherein it ordered the forfeiture of the Vessel and from this, Appeal is taken and allowed.

### Assignments of Error

The Appellant filed Assignments of Error which are found at pages 143, 144, 145, 146, 147, 148 of the Transcript:

#### I.

The District Court erred in finding and holding that all of the allegations of the libel are true.

#### II.

The District Court erred in finding and holding that all the denials set forth in the answer of the owner of the respondent vessel herein are untrue.

#### III.

The District Court erred in finding and holding that the allegations of paragraphs I and II of the affirmative defense in respondent charterer's answer are untrue.

#### IV.

The District Court erred in finding and holding that the allegations of paragraph I of the respondent owner of said Vessel are untrue.

#### V.

The District Court erred in finding and holding in paragraphs III and IV of the findings of fact that the respondent Vessel was engaged in trade other than that for which she was numbered and such finding of alleged fact is manifestly erroneous, obviously unsupported by the evidence and is the direct result of inference, conject-

ure and speculation resultant from the admission of incompetent, prejudicial and inadmissible evidence.

VI.

That the District Court erred in holding and finding in paragraph III of the findings of fact that respondent vessel was numbered SOLELY for fishing and for that the Government's Exhibit No. 9 which is a copy of the application clearly and definitely recites that the PRINCIPAL occupation will be fishing.

VII.

That the District Court erred in finding and holding that the said respondent vessel together with her motors, tackle, apparel and furniture was engaged in a trade other than that for which she was licensed or numbered in violation of Section 4377, R. S., 46 U. S. C. A., 325, and that such conclusion No. 1 is against the law, and is wholly unsupported by the evidence and is clearly presumptive and arrived at from prejudicial inference.

VIII.

That the District Court erred in finding and holding that the owner of the respondent Vessel knew at the time of numbering or AT ANY OTHER TIME, that the respondent Vessel was to be used for purposes other than that for which she was numbered.

IX.

That the District Court erred in admitting for identification Government's Exhibit No. 1 and for that the same is not a public record and no foundation was even laid for its admission and that in reality and fact it is a confidential generalized circular to employees of a Government bureau, interposed in the instant matter for the

sole and only purpose of prejudicing the rights and property of the respondent herein.

X.

That the District Court erred in admitting to evidence any of the direct testimony of the Government witness Allen Loyal Lundberg and for that the entire chain of testimony neither serves to prove or disprove any material allegation contained in the libellant's Libel of Information but on the contrary goes in its entirety to a date, place and occurrence not germane to the issues herein and was inserted for prejudicial reasons only.

XI.

That the District Court erred in admitting to evidence, that part of the direct testimony of Government witness Lieut. John Hay Fletcher and for that the witness was permitted to testify as to conversations without the presence of respondents and is not binding upon the respondents herein as such evidence is clearly hearsay and contrary to the law.

XII.

That the District Court erred in admitting to evidence that part of the testimony of the Government witness Lieu. John Hay Fletcher and for that the witness was permitted over the objection of respondent's proctor to interpose an opinion and conclusion without qualification as concerned the mental and physical action and reaction of one of the respondent's witnesses.

XIII.

That the District Court erred in admitting any or all of the testimony of the Government witness, Thomas Noland, and for that all the evidence is incompetent and

speculative and purports to connect the respondent vessel and owner with an act and deed occurring in foreign waters on a prior date, far remote from the situs of the case at bar.

XIV.

That the District Court erred in not admonishing and cautioning the proctor for the libelant and for that the libelant's proctor throughout the entire presentation of this matter consistently and with design interposed inadmissible statements and inflammatory questions and observations of such a biased, prejudicial nature as to preclude respondents from their constitutional prerogative, namely, the right to a fair trial.

XV.

That the District Court erred in not dismissing the Libel and Costs.

XVI.

That the District Court erred in holding and finding that the Respondent vessel had deviated from its plotted course and for that the Respondent vessel was still within the confines of the zone of navigation of the harbor and due care and caution was and is required within such zone to avoid incoming vessels, debris, flotsam and jetsam of the waterfront, buoys and ground swells of the sea.

XVII.

The District Court erred in finding and holding that the respondent vessel was on or had any plotted course at the time of seizure and for that the respondent vessel was so closely contiguous and adjacent to the harbor and shore as to place such decision into the realm of speculation and theory and contrary to the law.

XVIII.

That the District Court erred in holding and finding that the Respondents or any of them, received or were to receive any consideration, emolument or monetary reward for the goods, wares and merchandise aboard the Respondent vessel and for that the uncontradicted affirmative evidence and all of it definitely establishes the contrary.

XIX.

That the District Court erred in holding and finding that the Respondent vessel was engaged or about to engage in an illegal venture and for that the evidence does not disclose any conspiracy of any kind, does not disclose any contact with any vessel at any time, for lawful purposes or otherwise; does not disclose any intention of contacting other vessels; does not disclose the ability of the Respondent vessel to withstand the perils and rigors of the high seas.

XX.

The District Court erred in holding and finding that the Respondent vessel came within the purview of the statute by virtue of which authority the libelant acquired the property of the respondent herein, contrary to law.

XXI.

The District Court erred in holding and finding that the Respondent herein forfeited his property, the Respondent vessel, to the Libelant, and for that, such holding and finding is directly contrary and opposed to both the letter and the spirit of Section One, Article Fourteen of the Constitution of the United States of America.

XXII.

The District Court erred in entering a Decree in favor of Libelant and against the respondent and predicating such Decree upon the lack of cohesion of the evidence of the Respondent's defense rather than the preponderance of proof of the libelant.

XXIII.

That the District Court erred in finding that a Decree be entered in this cause declaring the respondent vessel forfeited to the United States, with all costs to be assessed against claimant, the same being contrary to the law, and based upon suspicion only.

**ARGUMENT**

I.

**Proceedings Under 46 U. S. C. A. 325 Not Applicable for Undocumented Motor Vessel of Less Than Five Net Tons.**

A. THE LANGUAGE OF THE STATUTE, WITH THE SUBSEQUENT REGULATIONS DOES NOT PERMIT OF THIS CONSTRUCTION.

Fitting the mosaic of facts in the instant cause to *Stephens vs. United States, The Russell*, 30 Fed. (2d) 286 (C. C. A. 5) the same basic elements are present, namely, a vessel of less than five net tons and undocumented. There, however, the analogy ends.

The F. H. Russell was an American Gas Motor boat of less than five net tons and was allotted the number A-829. She was thereafter seized with a *cargo* of *intoxicating liquor* and her tonnage increased from less than five net tons to 11.53 tons and when seized was NOT licensed.

The forfeiture of this vessel was decreed under 46 U. S. C. A. 325 because of two facts: first, she was not entitled to the benefit of that number by reason of net tonnage in excess of five tons, and for the further reason that she was subject to be licensed because of excessive tonnage and had she been licensed would have been then liable to forfeiture under Section 4377, *Revised Statutes*.

Appellant, however, submits that the V-293 was at the time of seizure of less than five net tons, was entitled to her number and was not possessed of contraband and was not violating any law or regulation of any nature.

#### B. WHAT CONSTITUTES TRADING UNDER SECTION 4377 REVISED STATUTES?

In the case of *United States vs. The Parynthia Davis* (D. C. Me. 1858), 3 Ware 159, 27 Fed. Case No. 16003, the Court held:

“ \* \* \* What constitutes trade or trading? The word ‘Trade’ is not here used to the restricted sense as equivalent to traffic but rather intended as equivalent to occupation, employment or business, for gain or profit \* \* \*.”

See also *The Swallow* (D. C. Me. 1882), Fed. Case No. 13066, holding that:

“\* \* \* The carrying of cattle from an island to the mainland in going out and returning when done gratuitously is NOT an act of trading.”

See also, *The Willie G.* (1 Hash 253), Fed. Case No. 17762 (D. C. of Me. 1870), which holds that:

“\* \* \* The taking on board in a foreign port and bringing into this Country two barrels without hire

or reward, but as a favor to a friend, supposed to contain crockery, but really containing liquors, is not engaging in trade within the meaning of Section 32 of the Act of February 18, 1793 (1 Stat. 316) and does NOT subject the vessel and cargo to forfeiture.”

In view of the foregoing authorities and assuming the validity of the Government’s broad major premise, which we do not, that a license is required, appellant still urges that the libel cannot be sustained as proof of any trading as herein defined upon the part of the V-293 is utterly absent and lacking.

Nor can it be established by soaring into the thin air of metaphysics and visualizing a boat, steaming a plotted course for fifteen hours from foreign waters, there to receive less than one third of invoice supposedly ordered by wireless, from the vessel of the appellant.

## II.

### **The Court Erred in Admitting Incompetent and Prejudicial Evidence**

Appellant will not presume upon the time of this Court to argue at length upon this question. Suffice to say that glaring and gross error inimical to the rights of the appellant occurred during the entire trial as is disclosed in the Transcript. See pages 41, 44, 45, 46, 47, 48 and 49, pages 50 to 58 and pages 64 to 69.

III.

**Congress Intended That Vessels of this Type Were Entitled to Additional Protection if Within Required Tonnage and Free of Contraband.**

From the acts of Congress and the subsequent regulations adopted by the Department of Commerce it is apparent that it was the intention to permit small vessels of this variety to engage in the several ventures essential to justification of investment and prescribed that a principal occupation be recorded, which in the instant cause was "FISHING."

Principal occupation means the major occupation which shall engage the vessel but does not limit to an *exclusive* occupation, for if this were true the Department of Commerce would have so required when application for number was made for the respondent vessel.

The Government is well aware of the diversity of this vessel's occupations as the subpoena duces tecum (pages 13-14 of Transcript) mutely but so powerfully bears silent witness.

Attention is respectfully directed also to the lack and absence of any prior overt or illegal act upon the part of the vessel.

We respectfully direct the attention of this Honorable Court to an address delivered by Mr. Chief Justice Hughes before the Federal Bar Association at Washington, D. C., on February 11, 1931, wherein the Honorable Chief Justice said in part as follows:

"The solicitors in the various departments may render, and I believe are rendering, an important service in keeping down the volume of litigation by

not attempting to force statutes to an extreme construction \* \* \*. There is abundant opportunity for good sense, even in administering laws.”

In view of all the matters presented herein, appellant urges that he has been unlawfully and illegally deprived of his property, without due process of law.

### Conclusion

The judgment of forfeiture of the Court below should be reversed and the libel dismissed.

Dated January 10th, 1933.

Respectfully submitted,

H. WM. HESS,

STANLEY M. DOYLE,

*Proctors for Appellant.*